



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of the Application of Jerry and
Bonnie Fronek for Water Quality Certification on
Shoreland Wetland Adjacent to Pine Lake, Town
of Hiles, Forest County

Case No. IH-11-038

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Pursuant to due notice, hearing was held at Crandon, Wisconsin on May 15, 2013, Jeffrey D. Boldt, Administrative Law Judge presiding.

The parties requested the opportunity to submit written briefs and the last was due on June 17, 2013.

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

Bonnie and Jerry Fronek, by

Attorney Thomas C. Roley
N5032 Sherry Road
Bryant, WI 54418

Wisconsin Department of Natural Resources, by

Attorney Jane Landretti
DNR – Office of Legal Counsel
P. O Box 7921
Madison, WI 53707-7921

FINDINGS OF FACT

1. Jerry and Bonnie Fronek, 7995 County Road DD, Pickerel, Wisconsin, filed an application with the Department of Natural Resources for water quality certification pursuant to Section 401 of the Federal Clean Water Act and Wis. Admin. Code §§ NR 299 and NR 103.

2. The proposed project is located in Section 16, Township 37 North, Range 12 East, Town of Hiles, Forest County. The proposed project would affect 4,300 square feet or 0.099 acres of mapped wetlands for the purpose of building a home with a garage and driveway.

3. The Department of Natural Resources denied the application for Water Quality Certification as outlined in a letter to Jerry and Bonnie Fronek dated November 10, 2011. By fax received on December 9, 2011, Jerry and Bonnie Fronek filed a petition for a contested case hearing pursuant to Wis. Stat. § 227.42 with the Department of Natural Resources. By letter dated January 17, 2012, the Department of Natural Resources granted the request for a contested case hearing. On March 1, 2013, the Department filed a Request for Hearing with the Division of Hearings and Appeals (Division).

4. The Wisconsin Wetland Inventory maps identify the project site as T5K wetlands. The Soil Survey of Forest County identified the project property as wetland with "severe limitations" due to wetness. The U.S. Army Corps of Engineers determined the entire lot, other than the previously filled access road, is wetland. The USACE classifies the wetland as coniferous swamp. Hydric soils were observed with a saprist muck texture.

5. This is a "federal jurisdiction wetland" because it is connected or adjacent to a navigable water of the United States. The proposed wetland fill area is part of a larger wetland complex which is connected to Pine Lake by way of surface water connection. (Patrick)

6. This high quality forested wetland provides significant wetland functional values. It was rated as "high" for the following functional values including: 1) floral diversity including: white cedar, tamarack, black ash, green ash, balsam fir, silky dogwood, tag alder, royal fern, cinnamon fern, leather leaf, sphagnum moss, sensitive fern, and red maple; 2) is critical for filtration or storage of sediments, nutrients or toxic substances that would otherwise adversely impact the quality of other adjacent waters of the state; 3) habitat for resident and transient species, including mammals, birds, reptiles and amphibians for breeding, resting, nesting, escape cover, travel corridors and food; 4) storm and flood water storage and retention and the moderation of water level fluctuations extremes. (Ex. 2; Patrick) The site was also rated as having a medium value for recreational, educational, scientific and natural scenic beauty values and uses. (Patrick)

The DNR Area Water Management Specialist, Keith Patrick, provided un-rebutted expert testimony that the proposed fill would have significant detrimental impacts to these functional values.

7. Consideration was given to the cumulative effects of similar projects when judging the significance of these impacts to the wetland functional values. The wetland is classified by the USACE as a coniferous swamp. Coniferous swamps are high quality wetlands which are considered highly valuable wetland resources. (Patrick)

8. Pine Lake is listed as an Area of Special Natural Resource Interest (ASNRI) as defined in Wis. Admin. Code NR 103.02(1). Endangered species recorded within one mile of the project site include the American Marten.

9. The proposed activity is not wetland dependent, and one or more practicable alternatives exist which will not adversely impact wetlands nor result in other significant adverse environmental consequences. The applicant purchased this 2.3 acre site in 2003 with approximately 100 feet of frontage on Pine Lake for \$14,000. Other properties with upland building sites were considerably more expensive, the price was reduced because the lot was almost entirely wetland. Surely the applicants must have understood that the price represented in part the obvious risk that building a residential home would not be approved to be built in such a high quality wetland.

Mr. Patrick testified that in fifteen years as a water management specialist he had never approved a wetland fill for residential construction in such a high quality wetland area. Further, the entire area around the proposed project is in an ASNRI wetland making any reconfiguration of the building site impossible. (Patrick) Accordingly, one reasonable alternative to the proposed fill is that wetland impacts be avoided by building the home, garage and driveway on a different property with a buildable upland site.

10. The Petitioner's principal witness was Forest County Zoning Administrator, Pam Labine. Ms. Labine testified that wetlands in the area may not be "filled" in the usual sense because the wetlands flow through the area and would flow over the proposed fill area. Ms. Labine further noted that Pine Lake is in a eutrophic state. The Pine Lake watershed is dominated primarily by forested land, which has a higher phosphorous chemical composition than fertilized lawns. (Ex. 2) Ms. Labine went on to conclude that forested wetlands were contributing to the lakes eutrophic state and that more development offers a solution to this environmental problem. However, there was no other corroborating scientific support for this hypothesis.

Rather, Mr. Patrick and even documents cited by Ms. Labine undercut her analysis. Patrick testified that the fill would have detrimental impact on numerous functional values of the wetland. Further, Ms. Labine offered an exhibit summarizing the evaluations of Pine Lake conducted by Onterra Engineering to support her claim. On page 20 the report concludes that overall, the situation in the Pine Lake watershed is close to ideal in terms of protecting the health of the lake.

The study goes on to attribute that health to a lack of development in Pine Lake. It further concludes that "[w]hen a lake's shoreline is developed, the increased impervious surface, removal of natural vegetation, installation of septic systems and other human practices can severely increase nutrient loads to the lake which degrade important habitat." (Ex. 4)

11. While building a residential home is not possible, the property is not without value. An alternative to minimize wetland impacts is to establish a parking area and an elevated walkway to the lake. A two vehicle parking area could be established immediately adjacent to the existing access road. An elevated walkway with an approved design could be installed with minimal wetland impacts. (Patrick; Ex. 2)

DISCUSSION

It's unfortunate that the Froneks purchased this non-buildable lot in a high-quality forested wetland without being completely aware that it was unsuitable for building a residence. While the price should have alerted them that it was unlikely to be a buildable lot, they testified credibly that they didn't know how difficult it would be to win approval to build a home on this lot. Similarly, the Forest County Zoning Administrator, Pam Labine, was impressive but unpersuasive in her efforts to overcome the strong legal presumption against placement of the fill to build a home at this location.

Very simply, it would not conform to the standards for water quality certification for filling a wetland under Wis. Admin. Code NR 103.08(3)(b) because practicable alternatives to such a fill exist which will avoid and minimize and adverse impacts to wetlands and will not result in other significant adverse environmental consequences. The most obvious alternative would be to buy a lot in a non-wetland area and build the home there. This is still a beautiful lot that can be enjoyed in many ways other than filling in the wetland and constructing a residence.

Further, there would be significant adverse environmental consequences on numerous wetland functional values, nearly all of which were rated as having unusually "high" values. The project proponent has not demonstrated that the proposed fill will not have significant detrimental impacts to these functional values. Rather, as described above, the preponderance of the credible evidence and all of the expert testimony demonstrated that such detrimental impacts were likely to result from the proposed fill.

It should be noted that Ms. Labine demonstrated considerable knowledge of the area, including observations relating to a paucity of private land in the area, but her conclusions were not sufficiently supported by any corroborating reports or other expert testimony challenging the Department expert opinions that filling the wetland would have significant detrimental impacts. Mr. Patrick, the DNR Area Water Management Specialist, was persuasive that using local sand as a fill material and filling in the instant wetland would have both localized and cumulative detrimental impacts to water quality because of the loss of the functional values described at length above in Finding Six.

Accordingly, the Department's denial of water quality certification must be affirmed because the applicants have not carried their burden of proof.

CONCLUSIONS OF LAW

1. The Division has authority under Wis. Stat. § 227.43(1)(b) and Wis. Admin. Code NR 299 to hear contested cases and issue necessary Orders relating to wetland water quality certification.
2. The instant hearing is a *de novo* hearing on the issue of whether the Department should grant, grant with conditions, deny or waive water quality certification pursuant to Wis.

Admin. Code NR 299.05(6). The project proponent bears the burden of demonstrating compliance with water quality standards.

3. The subject parcel is a “wetland” area where water is at, near or above the land surface long enough to be capable of supporting aquatic or hydrophytic vegetation and which has soils indicative of wet conditions. Wis. Admin. Code NR 103.02(5)

4. Placement of the fill would not conform to the standards for water quality certification for filling a wetland under Wis. Admin. Code NR 103.08(3)(b) because practicable alternatives to such a fill exist which will avoid and minimize and adverse impacts to wetlands and will not result in other significant adverse environmental consequences. These would include continuing to gain access to the lake by constructing parking and an elevated walkway.

5. The proposed project is not wetland dependent within the meaning of NR 103.08(3)(a), because the activity of creating and maintaining a residence is “not of a nature that requires location in or adjacent to surface waters or wetlands to fulfill its basic purpose.”

6. There are potential secondary detrimental impacts on wetland functional values from the proposed activity within the meaning of NR 103.08(3)(e). These include changes in hydrology in areas proximate to the proposed fill area.

7. The following water quality related functional values or uses of wetlands, within the range of natural variation of the affected wetland have been considered in reaching this determination pursuant to NR 103.03(1):

- (a) Floral diversity including but not limited to white cedar, tamarack, black ash, green ash, balsam fir, silky dogwood, tag alder, royal fern, cinnamon fern, leather leaf, sphagnum moss, sensitive fern, and red maple; and
- (b) Filtration or storage of sediments, nutrients or toxic substances that would otherwise adversely impact the quality of other waters of the state;
- (c) Habitat for resident and transient wildlife species, including mammals, birds, reptiles and amphibians for breeding, resting, nesting, escape cover, travel corridors and food; and
- (d) Storm and flood water storage and retention and the moderation of water level fluctuation extremes; and
- (e) Recreational, cultural, educational, scientific and natural scenic beauty values and uses.

The project proponent has not demonstrated that the proposed fill will not have significant detrimental impacts to these functional values. Rather, as described above, the preponderance of the credible evidence and all of the expert testimony demonstrated that such detrimental impacts were likely to result from the proposed fill.

8. The Department has complied with procedural requirements of Wis. Stat. § 1.11 relating to the assessment of environmental impacts.

ORDER

WHEREFORE IT IS HEREBY ORDERED that the Department's decision to deny the water quality certification be upheld and the petition for review be DISMISSED.

Dated at Madison, Wisconsin on July 31, 2013.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705
Telephone: (608) 266-7709
FAX: (608) 264-9885

By: _____
Jeffrey D. Boldt
Administrative Law Judge

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be served and filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent and shall be served upon the Secretary of the Department either personally or by certified mail at: 101 South Webster Street, P. O. Box 7921, Madison, WI 53707-7921. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53, to insure strict compliance with all its requirements.